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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 EASTERN DIVISION

11 CLARENCE ETHAN BOYCE,

12 Plaintiff,

13 v.

14 ALEJANDRO MAYORKAS¹,
15 SECRETARY, UNITED STATES
16 DEPARTMENT OF HOMELAND
17 SECURITY, CUSTOMS AND
18 BORDER PROTECTION,

Defendant.

No. ED CV 18-01576-CBM(SHKx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Honorable Consuelo B. Marshall
United States District Judge

Following a six-day bench trial in this action, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52:

I. **FINDINGS OF FACT**

Considering the evidence presented and weighing credibility, the Court finds as follows:

¹ Pursuant to Fed. R. Civ. P. 25(d), Alejandro Mayorkas, who was sworn in Secretary for Homeland Security on February 2, 2021, is automatically substituted as defendant in this matter.

1 1. On April 2, 2009, Plaintiff Clarence Boyce (“Plaintiff”) began his
2 employment as a Border Patrol Agent (“BPA”) with the U.S. Customs and Border
3 Protection (“CBP”).

4 2. Plaintiff held the position of BPA at all times relevant to this action until the
5 effective date of his removal on November 16, 2017.

6 3. On May 10, 2016, Plaintiff signed a Last Chance Agreement with CBP in
7 which he agreed not to engage in any conduct unbecoming a BPA for two years from the
8 effective date of the agreement. In exchange, CBP agreed not to immediately remove
9 Plaintiff from his position as a Border Patrol Agent, GS-1896-12 and to hold the removal
10 action in abeyance pending Plaintiff’s compliance with the agreement for the two-year
11 period.

12 4. In November 2017, Watch Commander (“WC”) Arturo Velez oversaw
13 patrol Group B, which included Supervisory Border Patrol Agents (“SBPA”) and
14 approximately 14 BPAs, including Plaintiff. Group B was the “day shift,” which was a
15 10 hour shift that started at 0600 hours (6:00 a.m.) and ended at 1600 hours (4:00 p.m.).

16 5. There is an overlap in shifts of Patrol Group B and Patrol Group C from
17 2:00-4:00 p.m. The purpose of the overlap between shifts is to avoid a gap in coverage
18 out in the field.

19 6. Under the Border Patrol Agent Pay Reform Act (“BPAPRA”), BPAs sign
20 an agreement at the beginning of each year, indicating how much overtime they commit
21 to work.

22 7. In November 2017, Plaintiff was a BPA assigned to patrol Group B at
23 Murrieta Station. Plaintiff had elected level 2 overtime, which required him to work 50
24 hours per week, and included 10 hours of BPAPRA. In November 2017, Plaintiff’s
25 BPAPRA overtime hours were from 2:00-4:00 p.m. during the last two hours of his shift.

26 8. On November 2, 2017, Plaintiff met with Supervisory Border Patrol Agent
27 (“SBPA”) Scott Pinckney and WC Arturo Velez. Plaintiff informed SBPA Pinckney
28 and WC Velez that another BPA, Froylan Mendiola (“Mendiola”), reported an allegation

1 that Mendiola had been subjected to unlawful racial profiling. During the same meeting
2 on November 2, 2017, Plaintiff also reported that BPA Ruth Chavez (“Chavez”)
3 complained about SBPA Pinckney.

4 9. On November 3, 2017, Plaintiff was assigned the Northbound License Plate
5 Reader nonfixed roving patrol duties in Zone 67. Zone 67 encompasses the I-15 corridor
6 from the city of Murrieta to the city of Corona.

7 10. Plaintiff was one of two units assigned to the I-15 northbound corridor in
8 Zone 67 on November 3, 2017.

9 11. Prior to arriving at the Murrieta Station on November 3, 2017, Plaintiff
10 contacted SBPA Pinckney to report that he would arrive at the Murrieta Station
11 approximately ten minutes late.

12 12. Plaintiff arrived at the Murrieta Station on November 3, 2017, at
13 approximately 6:11 a.m. Shortly after arriving at the station, Plaintiff was informed
14 about his work assignment in Zone 67.

15 13. At approximately 6:15 a.m. on November 3, 2017, Plaintiff met with SBPA
16 McClung in his office to discuss his shift assignment. Plaintiff also stated that he wanted
17 to work on an EEO related matter.

18 14. SBPA McClung informed Plaintiff on November 3, 2017 that Plaintiff was
19 one of two units assigned to the northbound I-15 northbound corridor in Zone 67, and
20 that Plaintiff could work on the EEO related matter at the end of his shift on BPAPRA
21 from 2:00-4:00 p.m.

22 15. At approximately 6:17 a.m. on November 3, 2017, Plaintiff and SBPA
23 McClung approached WC Velez to discuss the shift assignment and whether Plaintiff
24 could work on an EEO related matter that day.

25 16. WC Velez told Plaintiff he was needed out in the field due to staffing
26 limitations on November 3, 2017, Plaintiff was one of only two LPR chase units
27 assigned that day, and Plaintiff could work on any EEO related matters during the last
28

1 two hours of his shift from 2:00-4:00 p.m. during BPAPRA overtime on November 3,
2 2017.

3 17. Plaintiff repeated to WC Velez that he wanted to work on an EEO related
4 matter on November 3, 2017, but Velez instructed Plaintiff to go out in the field and
5 work his assigned duties, and told Plaintiff he was not to be at the station at a computer
6 until after 2:00 p.m. during his BPAPRA overtime that day. Later that morning on
7 November 3, 2017, Plaintiff said he was taking sick leave that day and Velez approved
8 Plaintiff's request for sick leave.

9 18. Weighing credibility, the Court finds WC Velez and SBPA McClung's
10 testimony that on November 3, 2017, Plaintiff was instructed to be out in the field and
11 not to return to the station until after 2:00 p.m., and was informed that he was authorized
12 to work on the EEO related matters after 2:00 p.m. during his BPAPRA overtime, was
13 credible. The Court finds Plaintiff's testimony that his supervisors did not tell him to
14 remain out in the field, did not tell him not to return to the station without supervisory
15 authorization, and did not tell him he could not start working on the EEO related matter
16 until after 2:00 p.m. during BPAPRA on November 3, 2017, was not credible.

17 19. Plaintiff subsequently elected not to take sick leave that day, SBPA
18 McClung gave Plaintiff keys for his assigned vehicle, and Plaintiff left the station to go
19 out into the field.

20 20. On November 3, 2017, Plaintiff returned from the field and entered the
21 Murrieta Station at approximately 10:40 a.m.

22 21. Plaintiff returned to the station without notifying his supervisors or
23 requesting authorization. Plaintiff remained at the station from approximately 10:40
24 a.m. until approximately 1:00 pm on November 3, 2017. Plaintiff began working on the
25 EEO related matter at the station at approximately 12:00 p.m. on November 3, 2017.

26 22. At approximately 12:50 p.m. on November 3, 2017, SBPA Pinckney and
27 SBPA McClung approached Plaintiff in the quiet room of the Murrieta Station. SBPA
28 Pinckney asked Plaintiff why he was back at the station and not out in the field. Plaintiff

1 told McClung and Pinckney that he was working on the EEO related matter. Plaintiff
2 subsequently requested sick leave which was granted, and Plaintiff departed the Murrieta
3 Station at approximately 1:00 p.m.

4 23. After Velez was informed that Plaintiff had returned to the station before
5 2:00 p.m. and was at a computer in the quiet room, Velez instructed the supervisors to
6 request that Plaintiff prepare a memo addressing: (1) why he violated a direct order to
7 stay in the field on November 3, 2017; and (2) who gave him permission to come in
8 from the field early to work on an EEO claim.

9 24. On November 3, 2017, WC Velez informed Acting Patrol Agent in Charge,
10 Marc Gonzalez (“Gonzalez”) regarding the incident involving Plaintiff. Gonzalez
11 instructed Velez to obtain memorandums from Plaintiff and the supervisors regarding the
12 incident with Plaintiff.

13 25. On November 4, 2017, Plaintiff requested and was granted emergency
14 annual leave.

15 26. On November 5, 2017, Plaintiff was called into SBPA Pinckney’s office.
16 SBPA Pinckney gave Plaintiff a Weingarten notice and instructed him to prepare a
17 memorandum regarding the November 3, 2017 events.

18 27. Plaintiff prepared a memorandum on November 5, 2017. In the
19 memorandum, Plaintiff accused SBPA Pinckney of harassment and retaliation.

20 28. On November 7, 2017, at approximately 1:10 a.m., Plaintiff sent an email to
21 Chief Rodney Scott accusing Murrieta Station management officials of misconduct. The
22 management officials included on the November 7, 2017 email, were Chief Rodney
23 Scott, Walter Davenport, Marc Gonzalez, Stanley McClung, Scott Gandre, Scott
24 Pinckney. Fredrick Kochmanksi and Arturo Velez were also included in the email.

25 29. On November 7, 2017, WC Velez forwarded his Memorandum to
26 Gonzalez, the Memorandums from SBPA McClung and SBPA Pinckney, access card
27 information, and the surveillance videotapes of Plaintiff. WC Velez was not aware
28 Plaintiff had signed a Last Chance Agreement when he submitted the memoranda

regarding the November 3, 2017 incident with Plaintiff to Gonzalez. WC Velez made no recommendation regarding any disciplinary action for Plaintiff, and was not the proposing or deciding official in regard to the removal.

4 30. Between November 3 and November 7, 2017, SBPA McClung was not
5 aware Plaintiff had signed a Last Chance Agreement. SBPA McClung did not propose
6 or recommend any disciplinary action for Plaintiff.

7 31. On November 16, 2017, Rodney Scott (“Scott”) was the Chief Patrol Agent
8 for the San Diego Sector.

9 32. On November 16, 2017, Scott determined Plaintiff's abandonment of his
10 assigned post without communicating or obtaining supervisory authority, Plaintiff's
11 insubordination, and Plaintiff's disregard of instructions from his supervisors to remain
12 out in the field and not return to the station until after 2:00 p.m. on November 3, 2017
13 was conduct unbecoming of a BPA which violated the terms of Plaintiff's Last Chance
14 Agreement.

15 33. On November 16, 2017, Scott issued a notice of removal action to Plaintiff.
16 Patrol Agent in Charge Walter Davenport physically handed Plaintiff the notice of
17 removal. The notice of removal stated Plaintiff breached the Last Chance Agreement by
18 engaging in conduct unbecoming a BPA.

19 34. On December 13, 2017, Plaintiff, through his attorneys, filed an action
20 before the Merit System Protection Board, appealing his removal.

II. CONCLUSIONS OF LAW

23 1. Plaintiff asserts a claim against Defendant for retaliation under Title VII.
24 To establish a prima facie case of retaliation, Plaintiff must demonstrate: (1) he engaged
25 or was engaging in activity protected under Title VII, (2) the employer subjected him to
26 an adverse employment decision, and (3) there was a causal link between the protected
27 activity and the employer's action. *Villiarimo v. Aloha Island Air*, 281 F.3d 1054, 1064
28 (9th Cir. 2002); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). As to the third

1 element for Plaintiff's prima facie case, Plaintiff must demonstrate his protected activity
 2 was a but-for cause of the alleged adverse action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*,
 3 133 S. Ct. 2517, 2534 (2013).

4 2. If Plaintiff establishes a prima facie case for retaliation, the *McDonnell*
 5 *Douglas* burden-shifting framework applies and "the burden of production—but not
 6 persuasion—then shifts to the employer to articulate some legitimate, nondiscriminatory
 7 reason for the challenged action." *Villiarimo*, 281 F.3d at 1062. "If the employer does
 8 so, the plaintiff must show that the articulated reason is pretextual either directly by
 9 persuading the court that a discriminatory reason more likely motivated the employer or
 10 indirectly by showing that the employer's proffered explanation is unworthy of
 11 credence." *Id.* (internal quotations and citations omitted). "[I]f the plaintiff can show
 12 pretext, then the *McDonnell Douglas* framework disappear[s]." *Id.* "The ultimate
 13 burden of persuading the trier of fact that the defendant intentionally [retaliated] against
 14 the plaintiff remains at all times with the plaintiff." *Id.* (internal quotations and citations
 15 omitted).

16 3. Assuming Plaintiff demonstrates a prima facie case of retaliation, the Court
 17 finds Defendant had a legitimate, non-discriminatory reason for removing Plaintiff from
 18 his position as BPA on November 16, 2017 based on Plaintiff's violation of the Last
 19 Chance Agreement for conduct unbecoming of a BPA based on Plaintiff's actions on
 20 November 3, 2017. *See Allstot v. Confluence Health*, 2018 WL 3966255, at *6 (E.D.
 21 Wash. Aug. 17, 2018) (violation of last chance agreement was a legitimate,
 22 nondiscriminatory reason for termination). Plaintiff disobeyed his supervisors'
 23 instructions on November 3, 2017 to work his assigned duties out in the field until 2:00
 24 p.m. and not return to the station to work on administrative matters including the EEO
 25 matter until after 2:00 p.m. during his BPAPRA overtime hours. Plaintiff's actions on
 26 November 3, 2017 demonstrated his disregard of his supervisors' authority and
 27 insubordination, which Scott determined to be conduct unbecoming of a BPA in
 28 violation of Plaintiff's Last Chance Agreement.

4. Plaintiff fails to demonstrate Defendant's proffered reason for terminating Plaintiff's employment is pretextual.

* * *

Any finding of fact which constitutes a conclusion of law is hereby deemed as a conclusion of law. Any conclusion of law which constitutes a finding of fact is hereby deemed a finding of fact.

III. CONCLUSION

For the foregoing reasons, judgment shall be entered in favor of Defendant and against Plaintiff.

Dated: November 8, 2022.

HON. CONSUELO B. MARSHALL
U.S. District Court Judge